

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8**

HEARTHSIDE FOOD SOLUTIONS, LLC

Employer

And

**BAKERY, CONFECTIONERY TOBACCO
WORKERS & GRAIN MILLERS
INTERNATIONAL UNION AFL-CIO, CLC**

Petitioner

Case 08-RC-264349

DECISION AND DIRECTION OF ELECTION

On a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended (Act), a hearing was conducted by video conference on September 3, 2020¹ before a hearing officer of the National Labor Relations Board (Board) on the sole issue of whether the Region should conduct an election for certain employees of the Employer by manual or mail ballot. The Employer argues that a manual election is appropriate and can be conducted safely despite the continuing COVID-19 pandemic. The Petitioner contends that only a mail ballot election is appropriate.

The Employer operates a facility in McComb, Ohio where it manufactures and packages baked goods and snacks. At the hearing, the parties stipulated to the following appropriate unit of employees (Unit):

All full-time and regular part-time production, maintenance, Q/A technicians, food safety, shipping and warehouse employees employed by the Employer at its facility located at 312 Radar Road, McComb, Ohio; but excluding all temporary employees, office clerical employees, managers, guards and supervisors as defined in the National Labor Relations Act.

The parties stipulated that employees employed in the EZ Pak classification would vote subject to challenge. There are approximately 1,228 employees employed in the stipulated unit and 18 employees employed in the EZ Pak classification.

Although election details, including the type of election to be held, are nonlitigable matters left to my discretion,² the parties were permitted to state their positions on the record and file post-

¹ All dates are in 2020, unless otherwise noted.

² Sec. 102.66(g)(1) of the Board's Rules and Regulations. See also, *Representation-Case Procedures*, 84 Fed. Reg. 69524, 69544 fn. 82 (Dec. 18, 2019) (citing *Manchester Knitted Fashions, Inc.*, 108 NLRB 1366, 1367 (1954)).

hearing briefs regarding the mechanics of the election. After carefully considering the arguments made by both parties, I find that a mail ballot election is appropriate given the extraordinary circumstances presented by the COVID-19 pandemic.

I. POSITIONS OF THE PARTIES

The Employer contends that manual elections are normally favored by the Board, and mail ballot elections, in its view, often result in lower voter participation. Next, in asserting that a manual election is appropriate in this case, the Employer cites to the relatively low level of COVID-19 cases in Hancock County, Ohio, where Employer's facility is located, as compared to the levels seen in various other parts of Ohio and the country. Further, the Employer explains that it has implemented various safety measures for staff and visitors to the facility lowering the risk of transmission, including, but not limited to, mandatory entrance screening including temperature checks and health questionnaires for everyone entering the facility, denying entrance to its facility for persons who fail the screening, mandatory facial coverings inside the facility and in public places, the use of personal protective equipment, and enhanced sanitation procedures throughout the facility. The Employer further asserts that it has shown the ability to effectively minimize transmission of the coronavirus in its facility, as only 27 employees of nearly 1,500 have contracted COVID-19, with zero evidence that any of the cases resulted from transmission at the facility. Finally, the Employer states that it would comply with suggestions included in General Counsel Memorandum 20-10 entitled "Suggested Manual Election Protocols" (GC 20-10), thereby reducing the risk of COVID-19 transmission during the election.

Contrary to the Employer, the Petitioner argues for the direction of a mail ballot election in this case. Citing to state and nationwide health data, the Petitioner contends that in-person voting increases the likelihood of virus transmission among all election participants due to the number of close contacts that must take place during a manual election, an unnecessary risk given the alternative of voting by mail. Moreover, the Petitioner relies on a number of Regional Director Decisions directing mail ballot elections since the beginning of this pandemic, and the number of unpublished Board Orders declining to overturn those decisions. Lastly, the Petitioner asserts that a manual election risks disenfranchising voters should they contract COVID-19 immediately prior to the election, as any positive cases will result in quarantining and the inability to access the Employer's facility to vote.

II. APPLICABLE LEGAL FRAMEWORK

Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to ensure the fair and free choice of bargaining representatives, and the Board, in turn, has delegated the discretion to determine the arrangements for an election to Regional Directors. *Ceva Logistics US*, 357 NLRB 628, 628 (2011) (cases cited therein); *San Diego Gas & Electric*, 325 NLRB 1143, 1144 (1998) (citing *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946); *Halliburton Services*, 265 NLRB 1154, 1154; *National Van Lines*, 120 NLRB 1343, 1346 (1958)). This discretion includes the ability to direct a mail ballot election where appropriate. *San Diego Gas* at 1144-1145. "[W]hatever determination a Regional Director makes should not be overturned unless a clear abuse of discretion is shown." *Nouveau Elevator*

Industries, Inc., 326 NLRB 470, 471 (1998) (citing *San Diego Gas* at 1144 fn. 1; *National Van Lines* at 1346).

The Board's longstanding policy is that elections should, as a general rule, be conducted manually. NLRB Casehandling Manual (Part Two) Representation Proceedings, Sec. 11301.2.³ However, a Regional Director may reasonably conclude, based on circumstances tending to make voting in a manual election difficult, to conduct an election by mail ballot. This includes a few specific situations addressed by the Board, including where voters are "scattered" over a wide geographic area, "scattered" in time due to employee schedules, in strike situations, or other "extraordinary circumstances." *San Diego Gas*, above at 1145.

Consistent with the recognition of the discretion afforded to Regional Directors in extraordinary circumstances in *San Diego Gas*, on April 17, the Board issued an announcement regarding the COVID-19 pandemic titled, "COVID-19 Operational Status," which states in pertinent part:

Representation petitions and elections are being processed and conducted by the regional offices. Consistent with their traditional authority, Regional Directors have discretion as to when, where, and if an election can be conducted, in accordance with existing NLRB precedent. In doing so, Regional Directors will consider the extraordinary circumstances of the current pandemic, to include safety, staffing, and federal, state and local laws and guidance.

Recently, the Board affirmed the ongoing COVID-19 pandemic to be extraordinary circumstances as contemplated by *San Diego Gas* and explained that it will continue to consider whether manual elections should be directed based on the circumstances prevailing in the Region charged with conducting the election. See *Brink's Global Services USA, Inc.*, 29-RC-260969 (unpublished July 14, 2020); *Sunsteel, LLC*, 19-RC-261739 (unpublished August 4, 2020), *PACE Southeast Michigan*, 07-RC-257046 (unpublished August 7, 2020), *TredRoc Tire Services*, 13-RC-263043 (unpublished August 19, 2020); *Daylight Transport, LLC*, 31-RC-262633 (unpublished August 19, 2020); *Rising Ground*, 02-RC-264192 (unpublished September 8, 2020), and *Sea World of Florida, LLC*, 12-RC-257917 (unpublished September 22, 2020).

As I describe below, I find that the COVID-19 pandemic is an extraordinary circumstance based on the current state of the COVID-19 pandemic in the relevant area, state and federal guidance, the nature of the Employer's operations as a large manufacturing facility with confirmed COVID-19 cases, and the ongoing uncertainties created by the pandemic at this time.

³ I note the provisions of the Casehandling Manual are not binding procedural rules. The Casehandling Manual is issued by the General Counsel, who does not have authority over matters of representation, and is only intended to provide nonbinding guidance to regional personnel in the handling of representation cases. See Representation-Case Procedures, 84 Fed. Reg. 39930, 39937 fn. 43 (2019) ("the General Counsel's nonbinding Casehandling Manual"); *Patient Care*, 360 NLRB 637, 638 (2014) (citing *Solvent Services*, 313 NLRB 645, 646 (1994); *Superior Industries*, 289 NLRB 834, 837 fn. 13 (1988)); *Aaron Medical Transportation, Inc.*, 22-RC-070888 (unpublished 2013) (citing *Hempstead Lincoln Mercury Motors Corp.*, 349 NLRB 552, 552 fn.4 (2007); *Queen Kapiolani Hotel*, 316 NLRB 655, 655 fn.5 (1995)). See also *Sunnyvale Medical Clinic*, 241 NLRB 1156, 1157 fn. 5 (1979).

III. ANALYSIS

A. Current State of the Pandemic in the Relevant Area and at the Employer's Facility

COVID-19 has created a public health crisis, responsible for over 209,000 deaths in this country.⁴ Currently, the daily number of new COVID-19 cases nationwide continues to be significantly higher than what it was at the time the Board issued its April 17 announcement. Indeed, within the last month, the seven-day rolling average of cases nationwide has begun to spike, rising from 34,371 cases per day on September 12, to 43,883 on October 6.⁵ In assessing the local conditions, I must consider the state of the pandemic in Northern Ohio, where the Board Agents who would be conducting the election are located, as well as Hancock County, Ohio where the Employer is located. Moreover, as we all know, the coronavirus does not recognize borders, and thus it is incumbent on me to assess the state of the virus in the surrounding area.

In Ohio, the number of daily confirmed COVID-19 has been reliably dynamic. Following a sustained decrease in the seven-day rolling average from the end of July through August 22, the number of cases continues to fluctuate. From August 22 through September 5, the seven-day rolling average rose sharply from 927 to 1,206. *Id.* Case trends decreased the following week, with the seven-day rolling average then increasing from 969 cases on September 12 to 1,132 on September 14. *Id.* Following another decrease in confirmed cases, the seven-day rolling average has risen again, from 879 on September 24, to 1,198 on October 6. *Id.*

On July 30, Ohio Governor Mike DeWine provided an update on Ohio's response to the COVID-19 pandemic, announcing that the State of Ohio continued to recommend the avoidance of gatherings larger than 10 people.⁶ Additionally, the State of Ohio developed an Ohio Public Health Advisory System to assess the degree of the virus' spread in local counties. Hancock County is currently at a Level 2 State of Emergency, marked by "increased exposure and spread" and which requires local residents and visitors to "exercise a high degree of caution."⁷ Individuals in a Level 2 County are asked to decrease in-person interactions outside of the household. Even more, Hancock County has been identified as a county with a "high case incidence." *Id.*

Putnam County, which borders the western side of Hancock County, is currently under a Level 3 State of Emergency which indicates a "very high exposure and spread" and where residents and visitors are required to "limit activities as much as possible." *Id.* It is also designated as a

⁴ "United States COVID-19 Cases and Deaths by State" U.S. Center for Disease Control and Prevention. https://covid.cdc.gov/covid-data-tracker/#cases_casesinlast7days (accessed October 6, 2020).

⁵ "Trends in Number of COVID-19 Cases in the US Reported to CDC, by State/Territory" U.S. Center for Disease Control and Prevention. https://covid.cdc.gov/covid-data-tracker/#trends_dailytrends (accessed October 6, 2020).

⁶ "Covid-19 Update: Liquor Sale and On-Premises Consumption Limits, Mass Gathering Order, Updated Risk Levels" Ohio Department of Health. <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/resources/news-releases-news-you-can-use/covid-19-update-07-30-20#:~:text=MASS%20GATHERING%20ORDER,-Governor%20DeWine%20announced&text=Mass%20gatherings%20in%20Ohio%20remain,homes%2C%22%20said%20Governor%20DeWine.> (accessed October 6, 2020).

⁷ "Ohio Public Health Advisory System" Ohio Department of Health. <https://coronavirus.ohio.gov/wps/portal/gov/covid-19/public-health-advisory-system/> (accessed October 6, 2020).

county with a “high case incidence.” *Id.* Individuals in a Level 3 County are asked to decrease interactions with others, consider necessary travel only, and limit gatherings of any number. McComb, Ohio, where the Employer’s facility is located, is only approximately five miles from the Putnam County border.

The Employer argues that the Hancock County area has largely been spared from COVID-19, as infection rates are comparatively low when viewed against other areas of the State, and country. However, even though the number of confirmed cases is low compared to other counties, and other states, the infection rate in the area is concerning. Recent data suggests that Hancock County’s “Cases Per 100,000 Population” infection rate is the 23 highest in the State of Ohio, or top 26 percent of Ohio counties.⁸ Moreover, that same data reveals that Putnam County, only five miles from the Employer’s facility, currently ranks **second** among Ohio counties for confirmed cases per 100,000 population. Seneca County, which borders the eastern edge of Hancock County, ranks 34 out of 88 Ohio counties. Wood County, bordering Hancock County on the northern side, is ranked **fifth** for cases per 100,000 population, and is also designated as a county with a “high case incidence.” As it is with Putnam County, McComb is approximately 5 miles or less from the Wood County border. This data is especially concerning.

The above statistics must also be considered in combination with confirmed cases at the Employer’s facility. There have been 27 confirmed cases among employees at the facility. The Employer argues that the number of confirmed cases is exceedingly low as compared to the total number of employees employed at the facility, especially in light of the length of time the pandemic has been ongoing. The key point, however, is that this workforce and facility has experienced confirmed COVID-19 cases, two cases as recent as the end of August and early September. The ongoing positive tests among the Employer’s workforce coupled with the relatively high rate of virus transmission in Hancock County and surrounding counties suggest the risk of transmission of COVID-19 in a manual election that will involve nearly 1,250 participants is significant.

B. Federal, State and Local Guidance

The U.S. Center for Disease Control and Prevention (CDC) explains that COVID-19 is primarily spread from person to person and that a person may become infected when an “infected person coughs, sneezes or talks” or by “touching a surface or object that has the virus on it, and then by touching your mouth, nose or eyes.”⁹ Guidance issued by the CDC recommends “limit[ing] in-person contact as much as possible.” In view of the ongoing pandemic, the State of

⁸ “Covid-19 Case Rates Per County as of Sept. 30, 2020” Ohio Department of Health. <https://coronavirus.ohio.gov/static/OPHASM/Case-Rates-by-County.pdf> (accessed October 6, 2020).

⁹ “Frequently Asked Questions, Spread” (updated August 4, 2020). U.S. Centers for Disease Control and Prevention. <https://www.cdc.gov/coronavirus/2019-ncov/faq.html> (accessed October 6, 2020).

Ohio continues to recommend that employers “allow as many employees as possible to work from home by implementing policies in areas such as teleworking and video conferencing.”¹⁰

Additionally, “COVID-19 can be spread by people who do not have symptoms and do not know that they are infected.”¹¹ Importantly, the CDC has instructed that cloth face coverings are not a substitute for proper social distancing.¹² The CDC further states that it is unlikely that the coronavirus will be spread from domestic or international mail, products or packaging.¹³ To avoid the unlikely possibility of contracting COVID-19 through the mail, the CDC simply advises: “[a]fter collecting mail from a post office or home mailbox, wash your hands with soap and water for at least 20 seconds or use a hand sanitizer with at least 60% alcohol.”¹⁴

Manual election procedures inherently require substantial interaction among voters, observers, party representatives and the Board agent, all of whom must be present at the Employer’s facility. In this case, multiple Board Agents, observers and party representatives must participate in a pre-election conference in which they must inspect the voting area and check the voter list. Given that some Unit employees speak Spanish and Laotian, the services of interpreters may also be required at an in-person election. The Employer’s proposal for an election includes 11 hours of polling, staggered over four polling sessions and two days.¹⁵ That time does not include the pre-election conference, the time it takes to set up and take down the election site or the count. Taken as a whole, this amounts to substantial in-person contact. Given the availability of a mail ballot election, ordering a manual election under the current circumstances would be in direct contradiction to the federal and state guidance, all of which advise avoiding in-person contact. This guidance is even more critical given the growing spread of COVID-19 in the local area.

¹⁰ “Business/Employers – COVID-19 Checklist” Ohio Department of Health.

<https://coronavirus.ohio.gov/wps/portal/gov/covid-19/checklists/english-checklists/Businesses-Employers-COVID-19-Checklist> (accessed October 6, 2020).

¹¹ “Frequently Asked Questions, Prevention” Centers for Disease Control and Prevention.

<https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Coronavirus-Disease-2019-Basics> (accessed October 6, 2020).

¹² “How to Protect Yourself & Others.” U.S. Centers for Disease Control and Prevention.

<https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (accessed October 6, 2020).

¹³ “Frequently Asked Questions, Prevention” U.S. Centers for Disease Control and Prevention.

<https://www.cdc.gov/coronavirus/2019-ncov/faq.html#How-to-Protect-Yourself> (accessed October 6, 2020).

¹⁴ “Running Essential Errands” U.S. Centers for Disease Control and Prevention.

<https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/essential-goods-services.html> (accessed October 6, 2020).

¹⁵ The Employer’s proposal of 11 hours of voting time for nearly 1,250 voters equates to approximately 113 voters per hour, or almost two voters per minute. Processing nearly two voters per minute will require constant interaction between Board Agents, observers, and election participants. In addition, individuals who do not speak English as their primary language may require additional assistance. Should this election proceed manually as proposed by the Employer, I have serious concerns that two voters can be processed per minute, while maintaining proper social distancing, sanitizing common touch surfaces between voters, and providing additional assistance to those voters who may need it. As such, it is likely that additional and lengthened voting periods will be needed, over additional days, requiring increased contacts among participants, increased exposure at the Employer’s facility among all involved, and lengthy Board Agent hotel stays. All of this can be avoided by conducting the election by mail.

The election would also require travel to the facility by a Board Agent and party representatives, which by virtue of the number of voters in this election, would likely require multiple overnights to accommodate the Employer's proposed polling sessions. The CDC continues to maintain that "[b]ecause travel increases your chances of getting infected and spreading COVID-19, **staying home is the best way to protect yourself and others from COVID-19**" (emphasis in original).¹⁶ As discussed above, the State of Ohio continues to recommend that those residing in a county under a Level 2 Emergency limit activities and avoid gatherings more than 10. Given that a manual election would necessitate a lengthy overnight stay by multiple Board Agents, ordering a manual election at this time would be contrary to the statewide guidance.

C. Voter Participation in Mail Ballot Elections

In support of its position regarding the mechanics of this election, the Employer argues that a manual election is necessary because voter participation is diminished in mail ballot elections. With citation to publicly available election results, the Employer claims that mail ballot elections conducted between March 14 and June 9 have seen a smaller level of voter participation than manual elections conducted from March 7 through March 13. Further, the Employer cites a recent mail ballot election result in *Fontanini Foods, LLC*, 13-RC-257636 (June 29, 2020) that involved the lengthening of the initial voting window to account for various issues in the election. I am not persuaded by the Employer's argument, and for the reasons that follow, I do not find merit to its contentions.

First, from the earliest days of the Act, the Board has permitted eligible voters in appropriate circumstances to cast their ballots by mail. See, *London Farm Dairy*, 323 NLRB 1057 (1997) (internal citations omitted). Furthermore, the Board has previously rejected arguments that mail ballot elections result in lower voter participation. See, *San Diego Gas & Electric*, 325 NLRB at 1146; *London Farm Dairy*, 323 NLRB at 1058. While long-standing Board policy favors manual elections, mail ballot elections continue to be an often-utilized voting method and continue to have their place in circumstances where manual elections are prohibitively challenging, including the extraordinary circumstances caused by this global pandemic.

In assessing the voter participation in Region 8-conducted mail ballot elections during this pandemic, I find that the Employer's concerns are not warranted. The following chart conclusively shows that mail ballot elections run in Region 8 have continued to enjoy a high voter participation rate.¹⁷

¹⁶ "Travel during the COVID-19 Pandemic" (updated August 9, 2020). U.S. Centers for Disease Control and Prevention. <https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-in-the-us.html> (accessed October 6, 2020).

¹⁷ "Recent Election Results" National Labor Relations Board. [https://www.nlr.gov/reports/graphs-data/recent-election-results?r\[0\]=08](https://www.nlr.gov/reports/graphs-data/recent-election-results?r[0]=08) (accessed October 6, 2020).

Case Name	Case Number	Date Petition Filed	Number of Ballots Cast	Number of Eligible Voters	Voter Participation Percentage
<i>Maple City Ice</i>	08-RD-245685	July 30, 2019 ¹⁸	7	7	100%
<i>Skylift, Inc.</i>	08-RC-257236	March 2	35	41	85%
<i>The Dover Tank and Plate Company</i>	08-RD-257467	March 5	13	14	93%
<i>Scioto Services, LLC</i>	08-RD-257948	March 13	19	24	79%
<i>Sifco Industries</i>	08-RC-257944	March 13	83	98	85%
<i>Lyon Video, Inc./Video Crew Service, LLC, a single employer</i>	08-RC-258375	March 24	100	105	95%
<i>Ryder Truck Rental, Inc.</i>	08-RC-260173	May 8	1	2	50%
<i>RMF Nooter, Inc.</i>	08-RD-261508	June 11	3	3	100%
<i>Downey Plumbing, Heating & Cooling, LLC</i>	08-RC-262149	June 25	15	15	100%
<i>Metropolitan Security Services, Inc. d/b/a Walden Security</i>	08-RC-263548	July 24, 2020	97	107	91%
<i>Maple City Ice Co.</i>	08-RD-264671	August 10, 2020	6	6	100%

In the eleven mail ballot elections noted above, there were 379 number of ballots cast out of a possible 422 eligible voters, which equates to a 90 percent voter participation rate. Accordingly, based on the above data, I do not find merit to the Employer's concern that a mail ballot election in this case will result in a significant decline in voter participation as compared to a manually run election.

D. Current Uncertainties of a Manual Election Caused by COVID-19

Furthermore, a mail ballot election avoids the uncertainties created by COVID-19. For example, although the exact percentage is uncertain, it is now well-established that a significant percentage of individuals infected with COVID-19 will remain asymptomatic and display no symptoms.¹⁹ It may take several days for a person who has been infected to start displaying symptoms, even though they are contagious prior to display of symptoms. As a result, despite the proposed screening measures, infected individuals could participate in the election, unknowingly exposing co-workers, party representatives, observers, and the Board Agents, who, along with the

¹⁸ While this petition was initially filed in 2019, the voting period took place between July 10 and July 30, 2020.

¹⁹ "COVID-19 Pandemic Planning Scenarios" (updated July 10, 2020). U.S. Centers for Disease Control and Prevention. <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html> (accessed October 6, 2020).

observers, will be in the voting area for a sustained and lengthy period of time. A mail ballot election eliminates this risk.

Moreover, if an employee tests positive for COVID-19, suspects they may have COVID-19 due to symptoms, has an elevated temperature, or must be quarantined due to COVID-19 exposure, they will be deprived of their right to vote in a manual election. A mail ballot election avoids this significant pitfall and ensures all have an opportunity to vote regardless of their exposure to COVID-19 or health status. Furthermore, there is no known date at which the guidance and circumstances I have described above will change. As a result, a mail ballot election in this matter will allow for holding of the election “at the earliest date practicable” consistent with the Board’s Rules and Regulations Section 102.67(b).

In its position statement, the Employer proposed various safety measures to mitigate the threat of COVID-19, including, but not limited to: the use of Plexiglas barriers between the Board Agents/observers and those approaching the tables; a separate table with approximately 500 individual, disposable writing utensils; floor markings to ensure proper social distancing; separate ingress and egress from the voting room; multiple voting booths and lists; disinfecting the voting area; providing proper personal protective equipment and hand sanitizer to all participants; and performing temperature checks before anyone participating in the election can enter the facility. It also agrees to abide by the suggestions made in GC 20-10.

I have carefully considered the Employer’s suggestions and the suggestions in GC 20-10. However, ultimately, as GC 20-10 recognizes, the decision to conduct the election by mail ballot is within my discretion and is a decision I must make on a case-by-case basis. Moreover, GC 20-10 provides guidance on how to safely conduct a manual election when and if a manual election is deemed appropriate. It is not a checklist whereby a party is entitled to a manual election if it can meet these requirements. In this case, as I have already described, we have not reached a safe enough juncture in the pandemic to hold a manual election in this case even with the proposed safety measures. I have determined that the most appropriate course of action at this time is to follow accepted guidance to limit in-person contact and travel.

The Employer argues that those eligible to vote have continued to work throughout the pandemic, and the low number of infected employees shows that an election can be safely conducted at its facility. I appreciate that employees have continued to work safely throughout this pandemic. However, it is misguided to equate normal, everyday work-day contacts between employees who are within the Employer’s control to a manual election that requires the processing of nearly 1,250 employees in a single, indoor room during limited voting windows. The sheer volume of employees who are eligible to participate in this election makes it likely that there will be contacts between employees, and other participants, that violate social distancing protocols. In addition, the Board Agents conducting the election will be focused entirely on the orderly processing of election participants, and thus will be unable to actively police whether employees are abiding by the facial covering requirements. As a consequence, the risk of virus transmission in these circumstances is high, especially if there are asymptomatic carriers of the virus participating in the election. I am not willing to take this risk. In addition, there are certain elements of a manual election that simply cannot be undertaken in compliance with proper social distancing requirements, specifically in the case of a challenged ballot. The Board Agents,

observers, and voter must be in close proximity to deal with the voter challenge and passing of the required challenge envelopes. See NLRB Casehandling Manual (Part Two) Representation Proceedings, Sec. 11338.3. Moreover, at the conclusion of the balloting, the ballot count will proceed in the same area with multiple people, which will unnecessarily cause a significant risk of exposure for all involved.

A mail ballot election would also meet the procedure and safeguards necessary to ensure the fair and free choice of bargaining representatives by employees. Any mail ballot election, held at any time under any circumstances, includes and ensures procedures by which an employee who has not received a ballot in a timely manner may receive a duplicate. There is no evidence that the mail service in Ohio, where the mail ballots will be sent and received, has been disrupted. Mail balloting provides no additional risk to Board Agents, parties, voters, or the public and is consistent with current guidance of limiting in-person contact and travel. Even in the midst of this pandemic, the Region has already successfully conducted a number of mail ballot elections, as shown above.

For the above reasons, I find that the appropriate and most responsible measure to ensure a safe election is a mail ballot election. A mail ballot election will eliminate the risk of unnecessarily exposing employees, Board agents, party representatives, and their families to COVID-19, and it will ensure that the Unit employees have the opportunity to vote and can do so promptly.²⁰

E. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter, I conclude as follows:

1. The Employer is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.²¹

²⁰ The Employer asserts that there are 380 Hispanic and 50 Laotian employees in the Unit, many of whom do not read or write well in English or their native language. The Employer argues that the mail ballot instructions are complex and could lead to voters being disenfranchised. I note that if any eligible voter has difficulty with any aspect of this mail ballot election, the eligible voter may call the Regional Office for assistance, as is the case for all mail ballot elections. Specifically, as referenced in Section 11336.2(c) of the Board's Casehandling Manual (Part Two) Representation Proceedings, all eligible voters in mail ballot elections are provided a mail ballot kit. The kit contains Form NLRB-4175 Instructions to Eligible Employees Voting by United States Mail (Instructions). Inserted on the bottom of the Instructions is the name of a designated Regional Office employee along with the employee's telephone number. The designated Regional Office employee named in the Instructions as the contact person will be readily available for any eligible voters to contact with any questions about the mail ballot election. The Notices of Election, the Instructions, and ballots will be translated into Spanish and Laotian and the Region will make sufficient arrangements to deal appropriately with all inquiries from any Spanish or Laotian speaking eligible voters in accordance with Section 11336.2(c) and 11315.3 of the Board's Casehandling Manual, Part 2, Representation Cases.

²¹ The Employer is a limited liability company with a facility located at 312 Radar Road, McComb, Ohio, the sole facility involved herein, where it is engaged in the business of manufacturing and packaging baked foods and snacks. The parties stipulated that during the past year, the Employer purchased and received at its McComb, Ohio facility goods valued in excess of \$50,000 directly from points located outside the State of Ohio.

2. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

4. There are no contract bars or any further bars in existence that would preclude the Region from processing the petition.

5. I finding that the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time production, maintenance, Q/A technicians, food safety, shipping and warehouse employees employed by the Employer at its facility located at 312 Radar Road, McComb, Ohio; but excluding all temporary employees, office clerical employees, managers, guards and supervisors as defined in the National Labor Relations Act.

OTHERS PERMITTED TO VOTE: The parties agree that EZ Pak employees may vote in the election, but their ballots will be challenged since their eligibility has not been resolved. No decision has been made regarding whether the individuals in this classification or group are included in, or excluded from, the bargaining unit. The eligibility or inclusion of these individuals will be resolved, if necessary, following the election.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by the Bakery, Confectionery Tobacco Workers & Grain Millers International Union AFL-CIO, CLC.

1. Election Details

The election will be conducted by mail. The ballots will be mailed to employees employed in the appropriate collective-bargaining unit at 4:45 p.m. (EDT) on **Friday, October 30, 2020** by personnel of the National Labor Relations Board, Region 8. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote by mail and do not receive a ballot in the mail by **November 6, 2020**, should communicate immediately with the National Labor Relations Board by calling Board Agent Roberta Montgomery at 216-303-7371, the Region 8 Office at (216)522-3715 or our national toll-free line at 1-844-762-NLRB (1-844-762-6572).

Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 8 Regional Office by close of business, 4:45 p.m. (EST) on **November 30, 2020**. The mail ballots will be commingled and counted on **December 2, 2020** at 10:00 a.m. (EST), either in person or by videoconference, after consultation with the parties. In order to be valid and counted, the returned ballots must be received by the Region 8 office prior to the counting of the ballots. The parties will be permitted to participate in the ballot count, which may be held by videoconference. If the ballot count is held by videoconference, a meeting invitation for the videoconference will be sent to the parties' representatives prior to the count. No party may make a video or audio recording or save any image of the ballot count.

As noted above, the Unit includes employees who speak English, Spanish, and Laotian. Therefore, the Notice of Election and Form NLRB-4175 Instructions to Eligible Employees Voting by United States Mail will be published in English, Spanish, and Laotian and the ballot will be multilingual.

2. Voting Eligibility

Eligible to vote are those in the unit who were employed during the weekly payroll period ending October 3, 2020, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote.

Also eligible to vote using the Board's challenged ballot procedure are those individuals employed in the EZ Pak classification whose eligibility remains unresolved as specified above and in the Notice of Election.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

3. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellphone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the Regional Director and the parties by **October 14, 2020**. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word (.doc or .docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

4. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notices of Election in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notices will be published in English, Spanish, and Laotian and will be sent by the Region separately. The Notices must be posted so all pages of the Notices are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notices of Election electronically to those employees. The Employer must post copies of the Notices at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions.²² A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Although neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board, all ballots will be impounded where a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision, if the Board has not already ruled on the request and therefore the issue under review remains unresolved. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated: October 9, 2020



Jennifer A Hadsall, Acting Regional Director
National Labor Relations Board, Region 8
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²² Pursuant to Section 102.5(c) of the Board's Rules and Regulations, a request for review must be filed by electronically submitting (E-Filing) it through the Agency's web site (www.nlr.gov), unless the party filing the request for review does not have access to the means for filing electronically or filing electronically would impose an undue burden.